State Courts, 1 J. Empirical Legal Stud. 459, 462-64 (2004). Galanter's article does not provide a specific cause for the decline in the number of trials, but instead lists several possible factors including: the increased complexity of trials, increased settlement due to higher jury verdicts, increased use of ADR, and the increased cost of trial. See generally, id. Interestingly, Galanter's article shows that the number of jury trials increased between 1962, the first year reviewed in the study, and 2002. Id. at 466. For these reasons, the Court should disregard Dr. Ketzner's attempt to apply this article to her case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
Thomas P. Scrivo
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962-2075
(973) 993-8100
Attorneys for Respondents, John Hancock Mutual Life Insurance Company and Provident Life and Accident Insurance Company

TABLE OF APPENDICES

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW JERSEY

Civil Action No. 99-4825 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

COMPLAINT – JURY TRIAL DEMANDED

Plaintiff, Helen Ketzner, M.D. ("Dr. Ketzner") by her undersigned counsel, alleges as her Complaint against Defendants John Hancock Mutual Life Insurance Company ("Hancock"), Provident Life Insurance Company ("Provident") as follows:

NATURE OF THE ACTION

1. This is an action for declaratory relief, breach

of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, conversion, negligent and intentional misrepresentation, violations of New Jersey's Consumer Protection Law, N.J.S.A. §§ 56:8-1 - 56:8-42 (West 1989); and false statements regarding coverage.

THE PARTIES

2. Dr. Ketzner is an individual residing at 51 Clinton Avenue, Ridgwood, New Jersey.

3. Upon information and belief, Hancock is a corporation organized and existing under the laws of the State of Massachusetts, with its principal place of business at One Hancock Place, Boston, Massachusetts 02205-9099. Upon information and belief, Hancock is licensed to do, and does regularly transact, business in New Jersey.

4. Upon information and belief, Provident is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in Chattanooga, Tennessee. Upon information and belief, Provident is licensed to do, and does regularly transact, business in New Jersey.

5. It appears from Provident's correspondence to Dr. Ketzner that Provident has assumed responsibility for the handling of Dr. Ketzner's claim for disability benefits as set

forth more fully below. Therefore, as used hereinafter, the term "Hancock" shall refer jointly and severally to both Hancock and Provident.

JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332, in that there is complete diversity of citizenship between the parties, and the amount in controversy exceeds $75,000, exclusive of interests and costs.

7. This Court has personal jurisdiction over Hancock because Hancock is licensed to do business in New Jersey and, upon information and belief, has regularly transacted the business of selling insurance in New Jersey through one or more of its general agents.

8. This Court has personal jurisdiction over Provident because Provident is licensed to do business in New Jersey and, upon information and belief, has regularly transacted the business of selling insurance in New Jersey through one or more of its general agents.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, as a substantial part of the events or omissions giving rise to the claims occurred in this District, and Hancock is subject to personal jurisdiction in this District.

FACTUAL BACKGROUND

A. Dr. Ketzner's Occupation

10. Dr. Ketzner graduated from her residency in internal medicine in 1983. Thereafter she began practicing medicine as an internist.

11. She has practiced as an internist either continuously, or nearly continuously, until November of 1997. In November of 1997, Dr. Ketzner was a staff physician at HIP of New Jersey in Paramus, New Jersey.

B. The Disability Insurance Policy

12. In 1991, Dr. Ketzner purchased a disability insurance policy from Hancock, effective approximately July 22, 1991, (the "Insurance Policy"), a true and correct copy of which is attached as Exhibit "A" hereto.

13. Dr. Ketzner has paid all premiums required under the policy.

14. Pursuant to the terms of the Insurance Policy Hancock would pay "the Monthly Income Benefit for each month (Dr. Ketzner is) totally disabled during a Policy Period."

15. Monthly Income Benefit is listed in the Insurance Policy as $5,500.00.

16. The term Total Disability means "only an incapacity which meets all of the following standards:

- It begins while this policy is in force.
- It is due to injury or sickness.
- It requires the particular care of a physician.
- It prevents you from performing the material duties of your regular occupation.

17. The term Regular Occupation is defined by the Insurance Policy to mean "the profession, business or employment engaged in just prior to a 'disability.'"

18. Sickness is defined to mean "illness or disease."

C. Dr. Ketzner's Initial Claim for Total Disability

19. In November, 1997, while the Insurance Policy was in full force, Dr, Ketzner suffered a nervous breakdown.

20. Dr. Ketzner was unable to continue work that day and was unable to return to work thereafter.

21. Dr. Ketzner was in treatment with Marsha Ontell, a clinical social worker, on an out patient basis, and Marsha Ontell diagnosed Dr. Ketzner as suffering from Major Depression.

22. Dr. Ketzner timely noticed Hancock of her

disability claim.

23. At some time after receiving notice, Hancock initiated an investigation of Dr. Ketzner's disability claim that took approximately one and a half years.

24. Throughout this time, Hancock paid only a small portion of the disability benefits that it owed to Dr. Ketzner.

D. Social Security Disability Benefits

25. Dr. Ketzner applied with the Social Security Administration (the "SSA") for Social Security Disability Insurance ("SSDI") benefits.

26. On December 16, 1998 the SSA issued its LL determination, finding Dr. Ketzner's condition prevented her from doing her usual work.

F. Independent Medical Examination

27. In January, 1999, Hancock decided to exercise its so-called "independent" medical examination option.

28. In January, 1999, Drs. Nancy Gallina, Ph.D., and David Gallina, M.D., respectively a psychologist and a psychiatrist hand-picked by Hancock, examined Dr. Ketzner.

29. Dr. Nancy Gallina opined in her report to Hancock that Dr. Ketzner is not experiencing psychological impairments that would prevent her from working, or training for some type of employment other than medicine.

30. Dr. Nancy Gallina further opined that "Dr.

Ketzner is at risk for possible recurrence of symptoms under certain stressful conditions that she may encounter in multiple areas of her life, as previously noted." One of the areas previously noted is Dr. Ketzner's occupation and work as a doctor.

31. Upon information and belief, so-called "independent" medical examinations, including those ordered by Hancock in this case, are not "independent" in any sense of the word. Indeed, so-called "independent" medical examiners, such as Drs. Gallina, are hired by and loyal to the insurance companies that pay them for their services.

H. Wrongful Refusal to Pay

32. Dr. Ketzner has fulfilled all conditions precedent to coverage, pursuant to the Insurance Policy. Hancock has failed and refused to honor its obligations under the Insurance Policy, and it has repudiated its obligations thereunder.

34. This and other wrongful conduct of Hancock has caused great damage to Dr. Ketzner.

COUNT I

(Declaratory Judgment)

35. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 34 as if set forth in full.

36. As set forth above, Hancock sold Dr. Ketzner the Insurance Policy.

37. Hancock has breached and continues to breach its promises, as set forth in the Insurance Policy, by failing and refusing to honor its promises to pay Dr. Ketzner the benefits owed to her for her permanent "Total Disability" as defined by the Insurance Policy.

38. An actual and justiciable controversy exists between Dr. Ketzner and Hancock regarding the interpretation of the Insurance Policy.

39. Accordingly, Dr. Ketzner is entitled to declaratory judgment of this Court of her rights and the obligations of Hancock under the Insurance Policy.

40. Declaratory relief from this Court will resolve outstanding issues between Dr. Ketzner and Hancock regarding the obligations of Hancock under the Insurance Policy.

WHEREFORE, pursuant to 28 U.S.C. § 2201, Dr. Ketzner seeks a judicial declaration by this Court that Hancock is obligated to pay Dr. Ketzner the benefits owed to her under the Insurance Policy, together with all costs of suit, compensatory and consequential damages, reasonable attorneys' fees, pre-judgment interest, post-judgment interest, and such additional relief as the Court deems just and appropriate.

COUNT II
(Breach of Insurance Policy)

41. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 40 as if set forth in full.

42. As set forth above, Hancock promised that if Dr. Ketzner "suffer[s] an Injury or Sickness that results in total disability which begins while this Policy is in force, (Hancock) will pay during total disability the monthly benefits in the amounts and for the time shown in the Schedule."

43. Dr. Ketzner has been diagnosed with Major Depression and other illnesses.

44. Dr. Ketzner's sickness causes her "total disability," meaning that she cannot return to her prior occupation. In fact, Dr. Ketzner cannot do anything in an occupational capacity.

45. Hancock has refused and continues to refuse to honor its promises contained in the Insurance Policy, by failing to pay Dr. Ketzner the benefits due and owing to her under the terms of the Insurance Policy for a total and permanent disability.

46. Dr. Ketzner has satisfied all conditions precedent to the receipt of disability payments under the Insurance Policy.

47. As a direct and proximate result of this breach of contract, Dr. Ketzner has suffered serious harm.

WHEREFORE, Dr. Ketzner requests judgment on

this Count as follows:

a. An award of monetary damages due and owing Dr. Ketzner because of Hancock's breach of the Insurance Policy;

b. An award of consequential damages;

c. An award of costs of suit and reasonable attorneys' fees;

d. An award of pre-judgment and post-judgment interest; and

e. Such other relief that the Court deems just and appropriate.

COUNT III
(Breach of the Duty of Good Faith and Fair Dealing)

48. Dr. Ketzner repeats and realleges the allegations in paragraphs 1 through 47 as if set forth in full.

49. Hancock owed, owes, and continues to owe Dr. Ketzner a duty of good faith and fair dealing.

50. The duty of good faith and fair dealing obligates Hancock to refrain from taking any action which would deprive Dr. Ketzner of the benefits of the Insurance Policy or which would operate to cause undue hardship or harm to Dr. Ketzner.

51. N.J.S.A. §§ 17:29B-3 *et seq.* (West 1994) prohibit unfair methods of competition and unfair or

deceptive acts or practices in the business of insurance; and establish minimum standards of good faith and fair dealing.

52. Hancock has failed and continues to fail to meet the minimum standards of good faith and fair dealing, as set forth in New Jersey common law and under N.J.S.A. § 17:29B-3 *et seq.*; 1713:30.13.1a.

53. Hancock has breached and continues to breach its duty of good faith and fair dealing towards Dr. Ketzner to the extent that it has engaged in conduct calculated to further its own economic interests at the expense of its policyholder, Dr. Ketzner.

54. Hancock has breached and continues to breach its duty of good faith and fair dealing by, among other things, engaging in the following conduct:

a. misrepresenting pertinent insurance policy provisions relating to the coverage at issue;

b. refusing to pay claims without conducting a reasonable investigation based upon all available information;

c. engaging in post-loss underwriting and post-denial justification;

d. forcing Dr. Ketzner into lengthy, expensive and emotionally and physically stressful litigation, at a time when Hancock knew that Dr. Ketzner was ill, in order to gain the benefits of the Insurance Policy;

e. making use of and benefiting from funds which should have been paid to Dr. Ketzner in response to Dr. Ketzner's request for insurance coverage;

f. failing promptly to provide a reasonable explanation of the basis in the Insurance Policy in relation to the facts or applicable law for denial of Dr. Ketzner's claim;

g. wrongfully depriving Dr. Ketzner of disability benefits at a time when Hancock knew or reasonably should have known that Dr. Ketzner was entitled to such disability benefits;

h. wrongfully and in bad faith interpreting tie Insurance Policy and the factual circumstances of Dr. Ketzner's claim for disability benefits so as to resolve ambiguities and uncertainties against Dr. Ketzner and in favor of its own interest;

i. failing to inform Dr. Ketzner of all possible bases of insurance coverage;

j. wrongfully depriving Dr. Ketzner of disability benefits on the basis of the size and kind of the claim rather than on the particular facts of the claim;

k. engaging in conduct violative of the Ethical Rules for Special Investigation Units;

l. interposing and continually asserting meritless reasons for denying Dr. Ketzner's claim for disability benefits; and

m. engaging in such other acts and omissions violative of Hancock's duty of good faith and fair dealing.

55. In particular, as set forth in the Insurance Policy, Hancock promised that in the event that Dr. Ketzner suffered an "injury" or "sickness" resulting in "disability" which began while the policy was still in force, Hancock would pay monthly benefits to Dr. Ketzner.

56. As promised by Hancock pursuant to the terms of the Insurance Policy, the fact that Dr. Ketzner is unable to perform the material duties of her work is sufficient to entitle her to benefits, Dr. Ketzner is under no obligation to undergo any type of vocational rehabilitation in order to determine her capacity to perform the material duties of another type of occupation, trade or profession.

57. Dr. Ketzner bought the Insurance Policy and paid premiums under the Insurance Policy based upon the terms set forth therein, and by misrepresenting those terms, Hancock has breached its duty of good faith and fair dealing to Dr. Ketzner.

58. Another specific example of Hancock's breach of its duty of good faith and fair dealing to Dr. Ketzner is its stubborn reliance on the report of its expert, Dr. David Gallina, to the exclusion of the other expert reports and information available. Tellingly, Dr. David Gallina is the sole person who determined that Dr. Ketzner was not able to

work in her regular profession.

59. Hancock clearly refused to pay Dr. Ketzner's claim without conducting a reasonable investigation based upon all available information, and thus breached its duty of good faith and fair dealing to Dr. Ketzner.

60. Hancock lacked a reasonable basis for denying Dr. Ketzner's claim, and Hancock knew or acted recklessly with respect to whether it had a reasonable basis for denying Dr. Ketzner's claim.

61. As a direct and proximate result of Hancock's wrongful acts, including compelling Dr. Ketzner to initiate this action, Dr. Ketzner has suffered serious damages.

62. Hancock acted toward Dr. Ketzner with conscious disregard of Dr. Ketzner's rights, and with the intent to vex, injure, and annoy Dr. Ketzner so as to constitute oppression, fraud, or malice, justifying punitive damages in an amount sufficient to punish Hancock.

WHEREFORE, Dr. Ketzner requests judgment on this Count as follows:

a. An award of monetary damages, due and owing Dr. Ketzner by way of Hancock's breach of the Insurance Policy and breach of the implied covenant of good faith and fair dealing, together with prejudgment and post-judgment interest;

b. An award of compensatory damages,

including an award for emotional distress suffered by Dr. Ketzner as a result of Hancock's wrongful conduct;

c. An award of consequential damages;

d. An award of punitive damages to punish Hancock pursuant to N.J.S.A. 2A:15-5.9, *et seq.*;

e. An award of attorneys' fees and costs; and

f. Such other relief that this Court deems just and appropriate.

COUNT IV
(Breach of Fiduciary Duty)

63. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 62 as if set forth in full.

64. The Insurance Policy, along with the services and expertise supplied by Hancock pursuant thereto, and Dr. Ketzner's placement of her trust in Hancock, created a fiduciary relationship between Hancock and Dr. Ketzner.

65. The fiduciary relationship between Hancock and Dr. Ketzner obligated Hancock to conduct itself fairly and with due care, diligence, and in good faith and in an open and honest manner toward Dr. Ketzner.

66. As Dr. Ketzner's fiduciary, Hancock is obligated to act in good faith in investigating Dr. Ketzner's insurance coverage claims.

67. Dr. Ketzner had reason to believe that she

could rely, and in fact did rely to her detriment, on Hancock's fulfilling its fiduciary duties and obligations, including those duties set forth herein.

68. By its handling of Dr. Ketzner's disability claim, Hancock deliberately and willfully breached and violated the fiduciary duties and obligations that it owed to Dr. Ketzner.

69. As a direct and proximate result of this breach, Dr. Ketzner has suffered and continues to suffer direct and consequential harm and expense including, without limitation, the costs of maintaining this action, for which Hancock is fully liable to Dr. Ketzner.

WHEREFORE, Dr. Ketzner requests judgment on this Count as follows:

a. An award of monetary damages, due and owing Dr. Ketzner by way of Hancock's breach of the Insurance Policy and breach of fiduciary duty, together with prejudgment and post-judgment interest;

b. An award of consequential damages;

c. An award of compensatory damages, including an award for emotional distress suffered by Dr. Ketzner as a result of Hancock's wrongful conduct;

d. An award of punitive damages to punish Hancock pursuant to N.J.S.A. 2A:15-5.9, *et seq.*;

e. An award of attorneys' fees and costs; and

f. Such other relief that this Court deems just and appropriate.

COUNT V
(Conversion)

70. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 69 as if set forth in full.

71. Under the terms of the Insurance Policy, Hancock promised that if Dr. Ketzner suffered an "injury" or "sickness" that resulted in "disability" which began while the Insurance Policy was in force, Hancock would pay monthly benefits to Dr. Ketzner.

72. Dr. Ketzner suffers from Major Depression and other illnesses, which caused, cause and continue to cause her total disability.

73. As a result, Hancock owes to Dr. Ketzner those monthly benefits that it promised to pay Dr. Ketzner in the event of her suffering total disability.

74. Those monthly benefits are Dr. Ketzner's property rights under the terms of the Insurance Policy.

75. Dr. Ketzner has a right to immediate possession of such benefits and Hancock has refused Dr. Ketzner's request for those benefits.

76. By intentionally denying those benefits to Dr. Ketzner, Hancock has wrongfully interfered with and controlled Dr. Ketzner's property rights.

77. Hancock has, at all times material hereto, acted intentionally to deprive Dr. Ketzner of her property rights.

78. Dr. Ketzner has demanded immediate possession of her property rights -- namely, payment of benefits under the Insurance Policy.

79. Hancock has refused and continues to refuse immediate payment to Dr. Ketzner.

80. As a direct and proximate result of Hancock's wrongful interference with Dr. Ketzner's property rights, Dr. Ketzner has been damaged.

WHEREFORE, Dr. Ketzner requests judgment on this count as follows:

a. An award of damages for the full amount of the monthly benefits due and owing to Dr. Ketzner, together with prejudgment and post-judgment interest, which are her rightful property and which Hancock continues to wrongfully interfere with and control;

b. An award of compensatory damages, including an award for emotional distress suffered by Dr. Ketzner as a result of Hancock's wrongful conduct;

c. An award of consequential damages;

d. An award of punitive damages to punish Hancock pursuant to N.J.S.A. 2A:15-5.9, *et seq.*;

e. An award of attorneys' fees and costs; and

f. Such other relief that the Court deems just and appropriate.

COUNT VI
(Negligent and Intentional Misrepresentation)

81. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 80 as if set forth in full.

82. Hancock, through its agents, has made repeated statements to Dr. Ketzner regarding Hancock's obligations and duties under the Insurance Policy, and other statements involving critical facts, laws or terms of coverage.

83. In particular, Hancock has represented that "We agree to provide benefits as stated in this policy, subject to all of its provisions, exceptions and limitations." In effect, Hancock is representing that if one keeps one's Hancock insurance policy in force, one will receive the benefits from Hancock if one becomes disabled.

84. Hancock also requested in the Insurance Policy that if Dr. Ketzner suffered an injury or sickness that resulted in total disability which began while the Insurance Policy was in force, Hancock would pay her monthly benefits.

85. Dr. Ketzner has suffered such a sickness in the form of Major Depression or other illnesses, is totally disabled as defined by the Insurance Policy, and has been denied these benefits by Hancock.

86. Hancock's above-referenced representations are false.

87. Upon information and belief, Hancock knew or acted negligently, carelessly, or recklessly with respect to the truth of the statements made.

88. The above-referenced statements were made intentionally to induce reliance by Dr. Ketzner.

89. Dr. Ketzner did, in fact, reasonably and justifiably rely to her detriment on said representations.

90. As a direct and proximate result, Dr. Ketzner has suffered serious damages.

WHEREFORE, Dr. Ketzner requests judgment on this Count as follows:

a. an award of monetary damages, equal to all the disability benefits due and owing Dr. Ketzner under the terms of the Insurance Policy, including pre-judgment and post-judgment interest;

b. An award of compensatory damages, including an award for emotional distress suffered by Dr. Ketzner as a result of Hancock's wrongful conduct;

c. An award of consequential damages;

d. An award of punitive damages to punish Hancock pursuant to N.J.S.A. 2A:15-5.9, *et seq.*;

e. An award of attorneys' fees and costs; and

f. Such other relief that the Court deems just and

appropriate.

COUNT VII
(Unjust Enrichment)

91. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 90 as if set forth in full.

92. Hancock has received valuable benefits, namely insurance premiums, paid by Dr. Ketzner to keep the Insurance Policy in force, and Hancock has also enjoyed the benefit of receipt of interest on said premiums.

93. Under the terms of the Insurance Policy, Hancock promised to pay disability benefits to Dr. Ketzner if Dr. Ketzner suffered an injury or sickness rendering her totally disabled.

94. Dr. Ketzner is totally disabled as defined by the Insurance Policy, triggering coverage under the Insurance Policy.

95. Hancock has failed and refused to honor its promises and commitments under the Insurance Policy, and has wrongfully withheld money due and owing to Dr. Ketzner.

96. Hancock understands and appreciates the fact that it has received Dr. Ketzner's premium payments.

97. Hancock knowingly accepted and retained, and continues knowingly to accept and retain, Dr. Ketzner's premium payments, without the slightest possibility that it

will ever honor its contractual commitments.

98. Thus, Hancock has failed and refused to give value in exchange for the benefits conferred -- namely, the premiums charged and interest thereon.

99. Hence, the amounts Hancock promised to pay Dr. Ketzner pursuant to the terms of the Insurance Policy are the amounts by which Hancock has been unjustly enriched.

100. Additionally, Hancock has been unjustly enriched by wrongfully earning interest on all money due and owing Dr. Ketzner.

101. Because it would be unjust for Hancock to retain these benefits, Dr. Ketzner seeks an award of the amount that Hancock has been unjustly enriched.

WHEREFORE, Dr. Ketzner requests judgment on this Count as follows:

a. An award of monetary damages representing all monies wrongfully retained by Hancock and constituting unjust enrichment, including interest accrued on such monies;

b. An award of attorney's fees and costs of suit;

c. An award of compensatory and consequential damage; and

d. Such further relief that the Court deems just and appropriate.

COUNT VIII

(Violation of New Jersey Consumer Protection Laws)

102. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 101 as if set forth in full.

103. N.J.S.A. §§ 56:8-1 - 56:8-42 regulate the sale or advertisement of merchandise and consumer transactions in New Jersey, and prohibits unfair methods of competition and unfair or deceptive acts or practices in the field of commerce.

104. Hancock's sale of the Insurance Policy to Dr. Ketzner constitutes a commercial transaction under N.J.S.A. §§ 56:8-1 - 56:8-42.

105. Hancock acted, used, or employed unconscionable commercial practices, deceptions, frauds, misrepresentations, and false pretenses and promises in its dealings with Dr. Ketzner, including the sale of the Insurance Policy.

106. As a direct and proximate result, Dr. Ketzner has suffered serious damages.

WHEREFORE, Dr. Ketzner requests judgment on this Count as follows:

a. An award of compensatory damages, including an award for the present value of all future benefits under the Insurance Policy and an award to compensate Dr. Ketzner for the emotional distress suffered as a result of Hancock's wrongful conduct;

b. An award of consequential damages;

c. An award of treble damages to punish Hancock;

d. An award of attorneys' fees and costs; and

e. Such other relief that this Court deems just and appropriate.

COUNT IX
(False Statements Regarding Coverage)

107. Dr. Ketzner repeats and realleges the allegations of paragraphs 1 through 106 as if set forth in full.

108. Hancock has contended that its decision to deny disability benefits to Dr. Ketzner was reviewed and approved by so-called "independent medical examiners."

109. Upon information and belief, the examiners hired by Hancock were picked by and paid by Hancock. Dr. Ketzner had no role whatsoever in the choice of such examiners and was not given any opportunity to present any medical facts to the experts.

110. As some courts have stated with respect to "independent" lawyers:

> [e]ven the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interest of his real client - - the one who is paying his fee and from whim he hopes to receive future business - - the insurance company.

United States Fidelity & Guar. Co. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978). The inherent tensions of the "independent" relationship are solid reasons the system remains grossly imperfect. A system where "[a] lawyer [or a

doctor] who does not look out for the carrier's best interest might soon find himself out of work," San Diego Navy Federal,,Credit Union v. Cumis Ins. Society, Inc. 162 Cal. App. 3d 358, 364, 208 Cal. Rptr. 494, 496 (1984), is one which is in the dire need of repair (Material in brackets added).

WHEREFORE, Dr. Ketzner requests that this Count adjudge and declare that Hancock is preliminarily and permanently enjoined from referring to medical and other experts it hires as "impartial," "independent" or as similar misleading terms.

ANDERSON KILL & OLICK, P.C.
A New York Professional Corp.
Attorneys for Plaintiff, Helen Ketzner, M.D.

By: Jonathan O. Bauer
Jonathan O. Bauer

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury of all issues.

Dated: October 13, 1999

ANDERSON KILL & OLICK, P.C.
A New York Professional Corp.
Attorneys for Plaintiff, Helen Ketzner, M.D.

By: Jonathan O. Bauer
Jonathan O. Bauer

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW JERSEY

Civil Action No. 95-228 (JFC)

HELEN KETZNER, M.D.,

Plaintiff,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

NOTICE OF MOTION TO AMEND THE COMPLAINT TO ADD A CLAIM FOR WRONGFUL DEFENSE

To: Steven P. Del Mauro, Esq.
Del Mauro, DiGiamo & Knepper, P.C.
8 Headquarters Plaza, North Tower
Morristown, NJ 07960

PLEASE TAKE NOTICE that on March 27, 2000, or as soon thereafter as counsel may be heard, the undersigned will move to Amend the Complaint to Add a Claim for Wrongful Defense as attorneys for Plaintiff, Helen

Ketzner, M.D.;

PLEASE TAKE FURTHER NOTICE that, in support of this motion, the undersigned shall rely upon the Memorandum of Law in Support of the Motion as well as the Certification of Jonathan O. Bauer, Esq., dated March 2, 2000.

Dated: March 2, 2000

ANDERSON KILL & OLICK, P.C.
A New York Professional Corp.
Attorneys for Plaintiff, Helen Ketzner, M.D.

By: Jonathan O. Bauer
Jonathan O. Bauer

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW JERSEY

Civil Action No. 95-228 (JFC)

HELEN KETZNER, M.D.,

Plaintiff

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

NOTICE OF MOTION TO AMEND THE COMPLAINT TO ADD A CLAIM THAT THE INSURANCE POLICIES AT ISSUE ARE "PRODUCTS"

To: Steven P. Del Mauro, Esq.
Del Mauro, DiGiamo & Knepper, P.C.
8 Headquarters Plaza, North Tower
Morristown, NJ 07960

PLEASE TAKE NOTICE that on March 27, 2000, or as soon thereafter as counsel may be heard, the undersigned will move to amend the Complaint to add a

Claim that the Insurance Policies at Issue are "Products" as attorneys for Plaintiff, Helen Ketzner, M.D.

PLEASE TAKE FURTHER NOTICE that, in support of this motion, the undersigned shall rely upon the Memorandum of Law in Support of the Motion as well as the Certification of Jonathan O. Bauer, Esq., dated March 2, 2000.

Dated: March 2, 2000

ANDERSON KILL & OLICK, P.C.
A New York Professional Corp.
Attorneys for Plaintiff, Helen Ketzner, M.D.

By: Jonathan O. Bauer
Jonathan O. Bauer

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

NOTICE OF MOTION TO AMEND THE COMPLAINT

PLEASE TAKE NOTICE that on April 8, 2002 at 10:00 a.m., Anderson Kill & Olick, P.C., counsel for Plaintiff Helen Ketzner, M.D. ("Dr. Ketzner") in this matter, will move before the Honorable G. Donald Haneke, United States Magistrate Judge, at the U.S. Courthouse, Newark, New Jersey to Amend the Complaint against Defendants John

Hancock Mutual Life Insurance Company and Provident Life Insurance Company (collectively referred to hereinafter as "Hancock") to add counts for post-complaint bad faith, claims harassment, post-loss underwriting, repudiation of the insurance policy, disgorgement of profits, invasion of privacy, malicious abuse of process, and opportunistic breach of the insurance contract.

PLEASE TAKE FURTHER NOTICE that, in support of its motion, counsel for Plaintiff Ketzner shall rely upon the Memorandum of Law in Support of Plaintiff's Motion to Amend and Certification of Paul E. Breene, Esq. in support thereof.

PLEASE TAKE FURTHER NOTICE that Plaintiff requests oral argument in the event that the Motion is opposed.

Dated: March 8, 2002

By: Paul E. Breene
Paul E. Breene, Esq. (PEB-7989)

Anderson, Kill & Olick, P.C.
A New York Professional Corporation
One Gateway Center, Suite 901
Newark, NJ 07102
Telephone: 973-642-5858
Attorneys for Plaintiff Helen Ketzner, M.D.

No. 05-372

In The Supreme Court of the United States

HELEN KETZNER, M.D.,

Petitioner,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMENDED REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondents have not, and cannot, refute the argument of Petitioner, Dr. Helen Ketzner: Dr. Ketzner's right to a civil jury trial was not preserved in violation of the Seventh Amendment. Scour Respondents' Brief in Opposition and nowhere is that argument squarely addressed or opposed. Respondents have set up and knocked down some strawmen; however, that they failed to take on the only actual issue presented to the Court further justifies granting the Petition.

I. THE DECLARATION OF INDEPENDENCE AND THE SEVENTH AMENDMENT PROVIDES FOR A RIGHT TO A CIVIL JURY TRIAL.

Respondents do not contend that the Seventh Amendment stands for something that it doesn't. Respondents admit, as they must, that the Seventh Amendment preserves the right to a civil jury trial.

The issue before the Court is not whether summary judgment or Federal Rule of Civil Procedure 56 in the abstract violates the Seventh Amendment. Respondents' attempt to reframe the issue before the Court is diversionary. The issue before the Court is whether Dr. Ketzner was denied her right under the Seventh Amendment to a civil jury trial. Respondents do not dispute that such a violation occurred. Accordingly, Dr. Ketzner's Petition should be granted.

II. RESPONDENTS AGREE WITH THE EMPIRICAL STUDY BROUGHT TO THE COURT'S ATTENTION.

Both Petitioner and Respondents agree on the authoritative value of the Journal of Empirical Legal Studies study. Respondents apparently took issue with Petitioner's choice to put before the Court a source that might not unequivocally support one side or the other.

III. THE LACK OF DISCOVERY IN DISABILITY INSURANCE CLAIMS VIOLATES THE SEVENTH AMENDMENT.

Dr. Ketzner sought discovery that was not permitted by the lower courts.[1] Without that opportunity, Dr. Ketzner could not preserve her Seventh Amendment rights.

IV. RESPONDENTS' DISTRUST OF JURIES IS NO REASON TO DENY DR. KETZNER'S SEVENTH AMENDMENT RIGHT.

As stated by then Associate Justice Rehnquist in Parklane Hosiery Co., Inc. v. Shore:

> [J]uries can make a difference, and our cases have, before today at least, recognized this obvious fact. Thus, in Colgrove v. Battin, 413 U.S., at 157, 93 S.

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[1] The Magistrate Judge was wrong when he decided against Dr. Ketzner based on the wrong facts.

> Ct., at 2453, we stated that "the purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable resolution of factual issues, Gasoline Products Co. v. Champlin Co., 283 U.S. 494, 498, 51 S. Ct. 513, 514, 75 L. Ed. 1188 (1931) . . . ." And in Byrd v. Blue Ridge Rural Electrical Cooperative, supra, 356 U.S., at 537, 78 S. Ct., at 900, the Court conceded that "the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense . . . . It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury." See Curtis v. Loether, 415 U.S., at 198, 94 S. Ct., at 1010; cf. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). Jurors bring to a case their common sense and community values; their "very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye." H. Kalven & H. Zeisel, The American Jury 8 (1966).

439 U.S. 322, 354-355 (1979).

Dr. Ketzner has the right to have her case aired before a group of her peers. Those peers would bring their

experience and common sense to bear on her dispute with Respondents. The Seventh Amendment exists to preserve the right to have "common sense and community values" enforced by their progenitors. Dr. Ketzner's right to a civil trial by jury was not so preserved; accordingly, Dr. Ketzner's Petition should be granted.

CONCLUSION

Dr. Helen Ketzner respectfully requests that this Court grant her Petition for Writ of Certiorari.

December 20, 2005

Respectfully submitted,

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